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IN THE

Supreme Court of the United States

October Term, 1949

No. 665

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Petitioner*

vs.

HOPPER PAPER COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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IN THE

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October Term, 1949

No.

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Petitioner*

VS.

HOPPER PAPER COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner herein prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered December 12, 1949, affirming a judgment in favor of respondent Hopper Paper Company against petitioner.

The opinion of the Court of Appeals is reported in *Hopper Paper Co.* v. *The Baltimore and Ohio Railroad Co.*,

178 F.(2d) 179. It will also be found at page 94 of the record.[1]

SUMMARY AND STATEMENT OF THE MATTER INVOLVED

As more fully appears from the brief annexed hereto, this case involves the liability of petitioner on respondent's claim for the value of a carload of paper destroyed while in interstate transit on petitioner's line of railroad under a uniform bill of lading whose provisions were not complied with in filing the claim. The material facts are undisputed.

The United States District Court for the Southern District of Illinois, which tried the case, found as facts that on August 10, 1945, Stanford Paper Company, as consignor, as agent and factor of Hopper Paper Company, respondent herein and plaintiff below, delivered the paper to Wabash Railroad Company, consigned to the Government Printing Office at Washington, D. C., under the usual uniform straight bill of lading; and that the Wabash Railroad Company delivered the paper to The Baltimore and Ohio Railroad Company, petitioner herein and defendant below, for completion of the transportation (R.74-75).

As the District Court concluded (R.75), the shipment involved was interstate in character and the contractual rights of the parties were governed by the uniform bill of lading (R.7). It provided among other things, as Section 2(b) of its "Contract Terms and Conditions", that

> "As a condition precedent to recovery, *claims* must be *filed in writing* with the receiving or delivering carrier, or carrier issuing this bill of lading, or car-

[1] References to the "record" in this Petition and in the brief annexed hereto are to pages of the record printed for the use of the Court of Appeals, as supplemented to show the proceedings and opinion there.

> rier on whose line the loss, damage, injury or delay occurred, *within nine months* after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid" (emphasis supplied).

As the appended brief demonstrates, that provision was and is authorized by Section 20(11) of the Interstate Commerce Act (Title 49 U.S.C., Sec. 20(11), 38 Stat. 1196, as amended April 23, 1930, 46 Stat. 251; Appendix A hereto), and in common with all other parts of the uniform bill of lading it has the force of law.

The District Court found as facts that on August 16, 1945, the paper was destroyed in a railway wreck on the lines of petitioner, and that petitioner on August 18, 1945, advised the consignor and the consignee, by telegrams duly received, as to the destruction of the paper (R.74-75); and that a claim in writing was first filed with petitioner on July 30, 1946 (R.75). This was more than eleven months after the loss and petitioner's telegraphic advice thereof.

Petitioner disallowed the claim because it had not been filed within the period of nine months provided by the bill of lading. Suit was brought by respondent Hopper Paper Company, the owner of the paper, in the Circuit Court of Sangamon County, Illinois, August 16, 1947 (R.2), asking damages in the sum of $4,224.96. The suit

was duly removed to the District Court of the United States for the Southern District of Illinois (R.23).

The complaint alleged that the defendant carrier, petitioner herein, knew that the property had been destroyed and that plaintiff was, therefore, not obliged to file a claim in writing as required by the bill of lading (R.4). Defendant set up in its answer the above quoted provision of the bill of lading, requiring the filing of a claim in writing within nine months, and alleged that no claim had been so filed (R.40). The case was tried by the District Court on the pleadings, documentary proof, agreements, and interrogatories (R.71).

The District Court found (R.75) that "defendant knew that it had destroyed such paper", and it concluded (R.75-76):

> "Actual knowledge by the defendant of the loss in question as disclosed by the facts of this case is sufficient and dispenses with the necessity for the filing of any notice or claim in writing required by Section 2(b) of the bill of lading as a condition precedent to recovery by plaintiff.
>
> Under the facts of this case formal notice or written claim was not a prerequisite to suit against the defendant."

On December 12, 1949, the Court of Appeals affirmed the District Court's judgment for the plaintiff, on similar grounds (178 F.(2d) 179).

JURISDICTION

The jurisdiction of this Court in this cause is based upon Title 28 U.S.C., Sec. 1254, 62 Stat. 928 (Appendix B hereto). The jurisdiction of the United States District Court was based upon Title 28 U.S.C., Sec. 41 (1), 36 Stat. 1091, as amended, 54 Stat 143 (now Sec. 1332, 62 Stat. 930) (Appendix C hereto).

Petitioner set up in its answer (R.38) the failure to comply with the bill of lading provision, and insisted throughout upon that defense as establishing the complete extinguishment of respondent's right to sue (R.26, 33, 40, 41, 46). A federal question was thus presented. *Chesapeake & Ohio Railway Co.* v. *Martin*, 283 U. S. 209 (1931); *Illinois Steel Co.* v. *The Baltimore and Ohio Railroad Co.*, 320 U. S. 508 (1944). The decision of the Court of Appeals denied the validity of that defense, the court's conclusion being that actual knowledge by the defendant of the loss dispenses with the necessity for filing a claim in writing as required by the bill of lading.

QUESTIONS PRESENTED

1. Is a carrier of an interstate shipment under the standard uniform bill of lading liable on a claim for loss or damage not filed in accordance with the terms of such bill of lading?

2. Does mere knowledge by the carrier of the loss of a shipment waive or excuse the condition precedent of the bill of lading to file claim in writing as required by its terms?

3. Is not compliance with the condition to file a claim jurisdictional and of the essence of the right to recover?

4. In the public interest, is compliance with the provisions of the bill of lading contract regarding the filing of claims susceptible through conduct of the parties thereto to waiver or estoppel?

5. Can the carrier, by knowing of the loss and advising the consignor and consignee that it has occurred, waive the filing of a claim in writing or estop itself to require such filing?

6. Does not the holding of the Court of Appeals open the door to unlawful discrimination between shippers?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

This Court should review the decision below because it brings doubt and uncertainty into a substantial segment of the law of interstate commerce, which is exclusively federal in nature and in whose certainty and non-discriminatory application there is national public interest.

The rights and obligations of the parties to the uniform railroad bill of lading, issued pursuant to requirements of the Interstate Commerce Act and of the Interstate Commerce Commission, vitally affect the transportation of shipments of goods by railroad in interstate commerce throughout the United States. The special importance of certainty in the law affecting those questions has long been recognized and heretofore well established. The public interest in the expeditious and non-discriminatory disposition of claims arising out of such transportation is as wide as the whole field of interstate commerce.

II.

This Court should review the decision below because it is probably in conflict with applicable decisions of this Court. The principle upon which this case turns has clearly been established by this Court in decisions with which the decision below is in sharp conflict.

III.

This Court should review the decision below because the specific question involved is an important question of federal law which should be settled by this Court. As previously stated, this Court has determined the ruling principle of this case, although, in its decisions so establishing

that principle, the precise facts of this case have not been dealt with.

IV.

This Court should review the decision below because it is in conflict with decisions of other Courts of Appeals on the same question.

V.

This Court should review the decision below because it erroneously relied on decisions of state courts applying local rules which are at variance with the federal rule governing this case.

VI.

This Court should review the decision below because, until corrected, it will permit and invite unlawful discrimination by carriers between shippers, and thus defeat one of the fundamental purposes of the Interstate Commerce Act.

WHEREFORE, your petitioner prays that a Writ of Certiorari may be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Seventh Circuit, to the end that the judgment of said court in this case may be reviewed by this Court.

THE BALTIMORE AND OHIO RAILROAD COMPANY

By EDWIN H. BURGESS
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Counsel for Petitioner

IN THE

Supreme Court of the United States

October Term, 1949

No.

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Petitioner*

VS.

HOPPER PAPER COMPANY

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE OPINIONS BELOW

The opinion of the Court of Appeals, review of which is sought by the Petition herein, is reported in *Hopper Paper Co.* v. *The Baltimore and Ohio Railroad Co.*, 178 F.(2d) 179. It will also be found at page 94 of the Record.

The opinion of the District Court is not officially reported, but is expressed in a "Memo for Counsel" appearing at page 73 of the Record.

The principal point decided by both courts was that since the carrier had knowledge of the loss of the shipment,

the provision in the bill of lading requiring the filing of a claim in writing as a "condition precedent" to the right to recover for the loss was thereby waived and inoperative, and the shipper was excused from such filing.

JURISDICTION

The jurisdiction of this Court in this cause is based upon Title 28 U.S.C., Sec. 1254, 62 Stat. 928 (Appendix B hereto). The jurisdiction of the United States District Court was based upon Title 28 U.S.C., Sec. 41(1), 36 Stat. 1091, as amended, 54 Stat. 143 (now Sec. 1332, 62 Stat. 930) (Appendix C hereto).

The shipment moved in interstate commerce under a bill of lading requiring, "as a condition precedent to recovery," the filing of a claim in writing within the time limitation authorized by Section 20(11) of the Interstate Commerce Act (Title 49 U.S.C., Sec. 20(11), 38 Stat. 1196, as amended April 23, 1930, 46 Stat. 251, Appendix A hereto). The Interstate Commerce Act makes it the duty of the carrier to promulgate and issue bills of lading (Title 49 U.S.C., Sec. 1(6); 36 Stat. 546, as amended, 41 Stat. 475; Appendix D hereto. Title 49 U.S.C., Sec. 20 (11), *supra*). It is well settled that rights and obligations growing out of interstate shipments moving under the uniform bill of lading are federal questions. *Chesapeake & Ohio Railway Co.* v. *Martin*, 283 U. S. 209 (1931); *Illinois Steel Co.* v. *The Baltimore and Ohio Railroad Co.*, 320 U. S. 508 (1944).

The grounds on which this Court is asked to exercise its jurisdiction by certiorari to review the decision of the Court of Appeals are fully set out in the Argument, pages 16 to 31, *infra*.

STATEMENT OF THE CASE

As was found by the District Court (R.74), on August 10, 1945, there was delivered to Wabash Railroad Company by Stanford Paper Company as agent for Hopper Paper Company, at Taylorville, Illinois, a carload of paper, consigned to the Government Printing Office at Washington, D. C. To cover the transaction the Wabash, as required by law (App. A hereto), issued a uniform through bill of lading (Exhibit A to the Complaint, R.7), to Stanford Paper Company, as consignor. As the District Court concluded (R.75), the shipment was interstate in character and the contractual rights of the parties were governed by the uniform bill of lading.

The paper was destroyed in a collision on August 16, 1945, while on the rails of petitioner, a connecting carrier participating in the through haul. Two days later, petitioner, by telegrams duly received, advised both the consignor and the consignee that the paper had been destroyed (R.56, 57, 75). The telegram addressed to the consignor was accepted by Hopper Paper Company, the respondent herein, which was the owner of the paper and had caused the shipment to be billed in the name of Stanford Paper Company, its factor and agent (R.35, 61-62).

The bill of lading contained a provision, designated Section 2(b) of the "Contract Terms and Conditions," reading as follows:

> "As a condition precedent to recovery, *claims* must be *filed in writing* with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, *within nine months* after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case

> of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid" (emphasis supplied).

This provision was authorized by that part of Section 20 (11) of the Interstate Commerce Act (Title 49, U. S. C. Sec. 20 (11), Appendix A hereto), reading as follows:

> "*Provided further*, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice:"

The District Court found as a fact (R.75) that a claim in writing was first filed with petitioner on July 30, 1946. This was more than eleven months after the loss and the telegraphic advice thereof by petitioner. Petitioner disallowed the claim because it had not been filed within the nine months period prescribed by the bill of lading.

Respondent brought this suit in the Circuit Court of Sangamon County, Illinois, August 16, 1947 (R.2) and the case was duly removed to the District Court of the United States for the Southern District of Illinois (R.23). Count I of the complaint, upon which the case was tried (R.71), alleged (R.4) that defendant (petitioner herein)

knew that it had totally destroyed the property of plaintiff (respondent herein); that defendant admitted the destruction and, therefore, plaintiff was not bound to file a claim in writing in compliance with Section 2(b) of the bill of lading, quoted above. Defendant set up in its answer that provision of the bill of lading, and alleged that no one had filed such a claim within nine months (R.40). The case was tried by the Court on the pleadings, documentary proof, agreements and interrogatories (R.71).

The District Court found (R.75) that "defendant knew that it had destroyed such paper", and it concluded (R.75-76):

> "Actual knowledge by the defendant of the loss in question as disclosed by the facts of this case is sufficient and dispenses with the necessity for the filing of any notice or claim in writing required by Section 2(b) of the bill of lading as a condition precedent to recovery by plaintiff.
>
> Under the facts of this case formal notice or written claim was not a prerequisite to suit against the defendant."

On December 12, 1949, the Court of Appeals affirmed the District Court's judgment for the plaintiff, on similar grounds (R.94), (178 F.(2d) 179).

It is submitted that the decisions of both courts below were erroneous as a matter of law.

SPECIFICATION OF ERRORS

The Court of Appeals for the Seventh Circuit erred:

(1) In holding that knowledge by the petitioner Railroad of the destruction of the shipment waived or excused performance of the obligation to file a claim in writing as required by the bill of lading.

(2) In holding that evidence of such knowledge, consisting of the carrier's file copy of its advice of such destruction to the shipper, satisfied the requirement of a written claim as set out in the bill of lading.

(3) In holding that compliance with the provisions of the uniform bill of lading contract is susceptible to waiver by the parties thereto.

(4) In holding petitioner liable on a claim admittedly not made as required by the uniform bill of lading contract.

(5) In holding that its decision would not open the door to that unlawful discrimination between shippers which is prohibited by the Interstate Commerce Act.

SUMMARY OF ARGUMENT

This Court should issue its writ of certiorari to review the decision of the Court of Appeals (hereinafter called the decision below) for the following reasons:

I.

The decision below brings doubt and uncertainty into a substantial segment of the law of interstate commerce, which is exclusively federal in nature and in whose certainty and non-discriminatory application there is national public interest.

The rights and obligations of the parties to the uniform railroad bill of lading, issued pursuant to requirements of the Interstate Commerce Act and of the Interstate Commerce Commission, vitally affect the transportation of shipments of goods by railroad in interstate commerce throughout the United States. The special importance of certainty in the law affecting those questions has long

been recognized and heretofore well established. The public interest in the expeditious and non-discriminatory disposition of claims arising out of such transportation is as wide as the whole field of interstate commerce.

II.

The decision below is probably in conflict with applicable decisions of this Court. The principle upon which this case turns has clearly been established by this Court in decisions with which the decision below is in sharp conflict. The court below summarily distinguished this Court's applicable decisions.

III.

The decision below is of a specific question — an important question of federal law — which should be settled by this Court. As previously stated, this Court has determined the ruling principle of this case, although, in its decisions establishing that principle, the precise facts of this case have not been dealt with.

IV.

The decision below is in conflict with decisions of other Courts of Appeals on the same question.

V.

The decision below erroneously relied on decisions of state courts applying local rules which are at variance with the federal rule governing this case.

VI.

The decision below, until corrected, will permit and invite unlawful discrimination by carriers between shippers, and thus defeat one of the fundamental purposes of the Interstate Commerce Act.

ARGUMENT

I.

This Court should review the decision below because it brings doubt and uncertainty into a substantial segment of the law of interstate commerce, which is exclusively federal in nature and in whose certainty and non-discriminatory application there is national public interest.

That the question upon which the decision below turned — that is, whether compliance with the claim requirement of the bill of lading was or could be waived — is a question of federal law, is too well settled to justify extended discussion. This Court so held in *Chesapeake & Ohio Railway Co.* v. *Martin*, 283 U. S. 209 (1931). The rule is the same as to the construction and effect of other provisions of the bill of lading. *Illinois Steel Co.* v. *The Baltimore and Ohio Railroad Co.*, 320 U. S. 508 (1944).

By Section 1(6) of the Interstate Commerce Act (Title 49, U. S. C., Sec. 1(6); Appendix D hereto), all common carriers must establish and enforce just and reasonable regulations and practices affecting "classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading". Section 20(11) of that Act clearly authorizes the inclusion of the limitation provision that appears in the uniform bill of lading.

The bill of lading used in this case — the uniform bill of lading — follows that approved by the Commission, with modifications corresponding to subsequent amendments to the Interstate Commerce Act. *In the Matter of Bills of Lading*, 52 I.C.C. 671 (1919); *Domestic Bill of Lading and Livestock Contract*, 64 I.C.C. 357 (1921);

Illinois Steel Co. v. *The Baltimore and Ohio Railroad Co.*, 320 U. S. 508 (1944).

There is no suggestion but that the bill of lading provision involved in this case was squarely within the provisions of the Act.[1]

The Court of Appeals, so far as its opinion shows, failed to appreciate that the questions presented are governed exclusively by federal law. This is indicated by that court's reliance almost entirely upon decisions of state courts which, as is shown at pages 26 to 28, *infra*, are not authoritative because they applied local rules at variance with the federal law governing this case.

The fundamental question here presented is not only a federal question but one affected with the widest public interest; and one which this Court should settle. In *Midstate Horticultural Co., Inc.*, v. *The Pennsylvania Railroad Co.*, 320 U. S. 356 (1943), this Court so premised its holding that the parties to a shipment in interstate commerce could not legally waive, by agreeing to extend, the time limit, established by Section 16 of the Interstate Commerce Act, within which the carrier might sue to collect its charges. As the Court said,

> "The Act is affected throughout its provisions, with the object not merely of regulating the relations of carrier and shipper *inter se*, but of securing the general public interest in adequate, nondiscriminatory transportation at reasonable rates. Accordingly, in respect to many matters concerning which variation in accordance with the exigencies of particular

[1] The inclusion of the limitation provision in the uniform bill of lading is the feature which completely distinguishes the instant case from *Louisiana & Western Railroad Co.* v. *Gardiner*, 273 U. S. 280 (1927), cited by the court below. The *Gardiner* case was a holding that the bill of lading there involved was devoid of a limitation provision because the limitation provision included in that bill was one not permitted by the Act.

> circumstances might be permissible, if only the parties' private interests or equities were involved, rigid adherence to the statutory scheme and standards is required" (320 U. S. at p. 361).

Similarly premised was the decision in *Empire Box Corp.* v. *The Delaware, Lackawanna and Western Railroad Co.*, 171 F.(2d) 389 (C.A. 2, 1948)[1], wherein the Court of Appeals for the Second Circuit said (p. 390):

> "Had the transactions been between the plaintiff and a party other than a common carrier, and had they not been subject to regulation under the Interstate Commerce Act the plaintiff would have no standing. . . . . Since, however, the charges were made and collected by a carrier under a published tariff, we cannot decide the case merely under the common law; and we think it is ruled by Davis *v.* Henderson."

Davis v. *Henderson*,[2] which the court in the *Empire Box* case found to be controlling, was in turn based on *Georgia, Florida & Alabama Railway Co.* v. *Blish Milling Co.*, 241 U. S. 190 (1916). That case, like the case at bar, involved the question whether compliance with the claim provision of the uniform bill of lading could be waived or excused. In answer to the shipper's contention that it was excused from filing a claim because the carrier had converted the goods, this Court said (p. 197):

> ". . . the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these

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[1] There, the consignee of certain railroad shipments had orally waived receipt of written notices which, under the tariff, were a condition precedent to the collection by the railroad of demurrage charges. Having paid such charges, the consignee thereafter sued to recover them, and a judgment in its favor was affirmed.

[2] 266 U. S. 92 (1924), a holding that a carrier could not, by accepting an oral order for cars, effectively waive a tariff rule requiring that such orders be in writing.

> terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed."

There can thus be no dissent from the proposition that the questions presented by this proceeding are of the greatest importance to shippers and carriers generally; that they are governed exclusively by federal law; and that they lie in a field in which certainty and non-discriminatory application are in the best public interest.

The decision of the court below, which we submit is contrary in principle to applicable decisions of this Court, and which is in conflict with decisions of other Courts of Appeals, as hereinafter demonstrated, has created a condition of doubt and uncertainty in this field of the law. This circumstance should, we submit, impel this Court to review the decision below.

II.

This Court should review the decision below because it is probably in conflict with applicable decisions of this Court.

The paramount policy of the Interstate Commerce Act, as frequently expounded by this Court, is that there shall be uniformity of treatment of all shippers by carriers by rail. *New York, N. H. & H. Railroad Co.* v. *Interstate Commerce Comm.*, 200 U. S. 361 (1906).

To that end, the decisions of this Court have held to the principle that the lawful rules and regulations established by the carriers must be adhered to — even to the apparent detriment, in unusual cases, of individual shippers and carriers. This field of the law is not one for the intrusion of variations and exceptions in favor of apparent

"hardship" cases.[1] The carriers were reminded of this, to their disadvantage, in the *Midstate Horticultural* case, discussed at page 17, *supra*. And the same rigidity, in effectuation of the paramount policy of uniformity, applies when the detriment is to the shipper.[2]

This Court has repeatedly held that knowledge by the carrier that a loss or damage has occurred does not excuse the shipper from filing a written notice or claim as required by the bill of lading, nor waive compliance with the notice or claim requirement, nor estop the carrier to insist upon such compliance as a condition precedent to recovery.

Chesapeake & Ohio Railway Co. v. *Martin*, 283 U. S. 209 (1931)

Davis, Director General v. *Roper Lumber Co.*, 269 U. S. 158 (1925)

Gooch v. *Oregon Short Line Railroad Co.*, 258 U. S. 22 (1922)

The Baltimore and Ohio Railroad Co. v. *Leach*, 249 U. S. 217 (1919)

Southern Pacific Co. v. *Stewart*, 248 U. S. 446 (1919)

St. Louis, I. Mt. & So. Railway Co. v. *Starbird*, 243 U. S. 592 (1917)

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[1] A recent reflection of this Court's policy appears in the *Empire Box* case, *supra* p. 18. There the Court of Appeals for the Second Circuit, in disposing of an argument directed to the apparent "hardship" involved in the refusal to recognize an attempt to waive the rule calling for written notice, said:

> ". . . . we think that the undoubted opportunity for abuse is not a justification for disregarding the canon of rigid adherence to the letter, which the Supreme Court has adopted in general towards published tariffs and their attendant rules. . . . . The regulations which govern the transactions of a great railroad — infinite in number and diversity as they are — demand speedy and certain application in practice, if the work is to go on as it should. Their incidence will often be harsh and unjust, and yet that may not be too high a price for smooth operation. The cost and delay in working out justice in the relatively few instances where their literal enforcement works injustice, may in the end involve more loss than gain. The law has often accepted similar compromises in recognition of its inability to decide every case on its merits; . . ." (171 F. (2d) 389, 391).

[2] *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* v. *Acme Fast Freight, Inc.*, 336 U. S. 465, 483, 488-9 (1949).

Each of the decisions cited above involved a loss of which the carrier had knowledge. In each there was a failure of the shipper to file a notice or claim in writing, as provided in the shipping contract. In each case it was contended that the carrier's knowledge relieved the shipper of the duty to file a notice or claim, and in each case this Court held that, notwithstanding such knowledge, the failure so to file precluded recovery.

The only decision of this Court cited by the court below in support of its holding that the failure to file a claim could be, and was, excused, is *Georgia, Florida & Alabama Railway Co.* v. *Blish Milling Co.*, 241 U. S. 190 (1916). That decision is not in point because the question there was *whether* a claim in writing was filed by the shipper and the holding was that a *claim was filed.* The language quoted by the court below, that the bill of lading stipulation for a written claim "is addressed to a practical exigency and it is to be construed in a practical way", was used by this Court in arriving at its conclusion that telegrams constitute a proper *form* of claim. What this Court said was (241 U. S. 190, 198):

> "Granting that the stipulation is applicable and valid, it does not require documents in a particular form. *It is addressed to a practical exigency and it is to be construed in a practical way.* The stipulation required that the claim should be made in writing, but a telegram which in itself or taken with other telegrams contained an adequate statement must be deemed to satisfy this requirement" (emphasis supplied).

Far from holding that the shipper's failure to file a claim in writing could be deemed excused or waived because of knowledge on the part of the carrier, this Court

indicated clearly in the *Blish* decision that the law is to the contrary, by saying that ". . . the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms . . ." (241 U. S. 190, 197).

It does not seem feasible, within the limits of a brief directed, as this is, to the question whether this Court shall review the decision below, to dwell at length on the legal and practical confusion that will be wrought by the failure of that decision to distinguish between mere knowledge of a loss and the filing of a claim for compensation.[1] We merely point out that the decision below is fundamentally fallacious in presuming that the necessity of filing a claim can be tested in the light of knowledge as to liability. By no means every loss, damage or delay to goods in the hands of the carrier results in carrier liability. Acts of God or the public enemy, acts or defaults of the shipper (such as defective preparation of the goods for shipment), and defects or vices in the goods (in the absence of carrier negligence) are some of the circumstances which relieve the carrier from liability. The decision of the court below wipes out the distinction between mere knowledge of a loss and the filing of a claim for compensation, without attempting to define the factual area affected other than by saying that the same rule would uniformly apply "under similar facts".[2]

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[1] Attention is called to this Court's recognition of the distinct importance of the *claim*, in its opinion in the *Blish* case, 241 U. S. 190, 195-196, including language whose significance is lost when quoted out of context, as in the opinion of the court below.

[2] The possibilities for unlawful discrimination among shippers presented by this vagueness are discussed at pages 28 to 30, *infra*.

The court below sought to distinguish the decisions of this Court which were cited to it in support of our principal contention, only by the general assertion that they did not involve "the identical problem". We submit that the "problem" in those cases was the same as the "problem" in the case at bar, and that the decision below is therefore in conflict with them. This Court alone can determine that question, and we submit that it should take jurisdiction of this case for that purpose.

III.

This Court should review the decision below because the specific question involved — an important question of federal law — should be settled by this Court.

In *Chesapeake & Ohio Railway Company* v. *Martin*, 283 U. S. 209 (1931), *supra*, p. 20, this Court held, as it had previously held, that knowledge by the carrier that a loss or damage had occurred did not excuse the shipper from filing a claim in writing as required by the bill of lading. Relying upon its previous decision in *Georgia, Florida & Alabama Railway Co.* v. *Blish Milling Co.*, 241 U. S. 190 (1916), *supra*, pp. 18, 21-22, the Court said that the fact that the goods were not delivered in accordance with the shipping contract (a fact which was, of course, known to the carrier), could not successfully be set up as an estoppel against the assertion of the defense that the shipper had failed to comply with the claim requirement of the bill of lading.

The *Martin* decision, and the other decisions of this Court referred to in Part II hereof, are certainly determinative of the principle involved in the case at bar. And but for the Court's reservation, in its opinion in the *Martin* case, of the point as to whether, *under any cir-*

cumstances, a shipper might rely upon the doctrine of estoppel in avoidance of the time limitation clause of the bill of lading, we would have no hesitancy to assert that the precise question involved in this case has been settled by this Court. Certainly, in the light of the decision below and its ramifications, this case presents a question which *should* be settled by this Court and involves no such special circumstances as would bring it within any exception to the well established principle.

IV.

This Court should review the decision below because it is in conflict with decisions of other Courts of Appeals on the same question.

The decision of the court below is in conflict with decisions of the Courts of Appeals of the First, Eighth and Ninth Circuits and of the District of Columbia. Those decisions are:

Gillette Safety Razor Co. v. *Davis, Director General*, 278 Fed. 864 (C.A. 1, 1922), cert. den. 259 U. S. 587.

Manby v. *Union Pacific Railroad Co.*, 10 F. (2d) 327 (C.A. 8, 1926)

Olson v. *Chicago, Burlington & Quincy Railroad Co.*, 250 Fed. 372 (C.A. 8, 1918)

Clegg v. *St. Louis & San Francisco Railroad Co.*, 203 Fed. 971 (C.A. 8, 1913)

Kidwell v. *Oregon Short Line Railroad Co.*, 208 Fed. 1 (C.A. 9, 1913)

American Ry. Express Co. v. *The Fashion Shop*, 10 F.(2d) 909 (C.A. D.C., 1926)

In each of those cases there was knowledge by the carrier of the loss or damage of the goods, and in each there was a failure by the shipper to file a written notice

or claim in accordance with the applicable bill of lading provision. In every case the court held that knowledge by the carrier did not excuse the shipper's failure to file.

The opinion of the court below cites only one Court of Appeals decision, that in *Lehigh Valley Railroad Co.* v. *State of Russia*, 21 F.(2d) 396 (C.A. 2, 1927), cert. den. 275 U. S. 571. But that decision did not involve the question presented in the instant case, for in that case a claim in writing *was* filed with the carrier. The question was as to whether the filing of such claim at an intermediate point at the express direction of the carrier, rather than at the point of delivery or of origin (as the bill of lading provided), was a sufficient compliance with the condition precedent to recovery.

We suggest that the language of the court below indicates that it misapprehended the effect of that decision. In referring to it, the court below said:

> "The court held that since the carrier had knowledge of the loss which it had reported to the consignee, the plaintiff could recover."

What the court said in the case cited was (21 F.(2d) 396, 404):

> "The carrier having reported the loss to the consignee, and instructed the filing of the claim with the Philadelphia general freight claim agent, the requirements of the terms of the bill of lading were fulfilled [by the filing of the claim as instructed]. The carrier had knowledge of the loss, *and was advised by the owner that it asserted a claim for the loss within the prescribed four months' period of the bill of lading*" (emphasis supplied).

Clearly, that decision does not support the proposition of the court below that knowledge by the carrier of the loss excuses the shipper from filing any claim.

We submit, then, that the decision below is in conflict with the decisions of other Courts of Appeals, and should be reviewed so that the conflict may be determined.

V.

This Court should review the decision below because it erroneously relied on decisions of state courts applying local rules which are at variance with the federal rule governing this case.

As authority for its statement that the "general rule" is that failure to give notice of claim is excused, or that the claim requirement is inapplicable, where the carrier has knowledge of the loss, the court below cites only 9 Am. Jur., Sec. 903, page 920, and 13 Corpus Juris Secundum, Sec. 240(a), page 487. The former work supports its statement solely by references to decisions of state courts, the effect of which is discussed in this Part of our brief, and the latter work, at the point cited, affirmatively supports our position.

In arriving at its holding herein the court below placed reliance, beyond the texts just adverted to, upon five decisions of state courts, in each of which the local law was applied. Significantly, all five such decisions were rendered *prior* to the decision of this Court in *St. Louis, I. Mt. & So. Railway Co.* v. *Starbird, supra* p. 20, which held that the rights and obligations of the parties to bills of lading covering interstate shipments of goods by rail are governed exclusively by federal law,[1] and that knowledge by the carrier of a loss does not excuse a failure to file claim where such filing is required by the provisions of the bill of lading. Indeed, the Supreme Court of North

[1] The *Starbird* decision was, in turn, based on *Adams Express Co.* v. *Croninger*, 226 U. S. 491 (1913).

Carolina subsequently gave recognition to the principle, thus established, of the paramount effect of federal law in this field by expressly overruling[1] its own earlier decision in *Kime* v. *Southern Railway Company*[2] which is one of the five state cases cited by the court below.

Typical of other state court decisions rendered *subsequently* to the decision in the *Starbird* case in which the supremacy of federal law in this field is recognized, is *Metz Co.* v. *Boston & Maine Railroad Co.*, 227 Mass. 307, 116 N.E. 475 (1917), which involved a bill of lading requirement for the filing of written notice of loss and the effect of knowledge of the loss on the part of the carrier. There, the Supreme Judicial Court of Massachusetts, after quoting from the *Blish Milling Company* case, *supra* p. 18, said (116 N.E. at 476):

> "This decision appears to mean that, when the form of the bill of lading with its numerous contractual provisions has been filed according to law with the Interstate Commerce Commission, and the interstate rate for transportation has been fixed with reference to the terms and obligations of that uniform bill of lading, then those contractual terms and obligations become a part of the rate established and neither party can depart from them. The shipper and the carrier become bound inexorably by them."
>
> * * * *
>
> "The doctrine of waiver is not applicable to any subject where the public policy has been authoritatively declared to be contrary to waiver of rights. Laws founded upon considerations of public policy cannot be evaded by the device of waiver."

We submit that the court below overlooked the nulli-

[1] *Taft and Vandyke* v. *Atlantic Coast Line Railroad Co.*, 174 N. C. 211, 93 S.E. 752 (1917). This later decision of the North Carolina court apparently escaped the attention of the court below.

[2] 153 N. C. 398, 69 S.E. 264 (1910).

fying effect of the *Starbird* and *Croninger* decisions upon state court cases applying local law at variance with the federal rule. Since those decisions it has been clear that the questions in this case are controlled by the decisions of this Court. It is equally clear that this Court's decisions do not support, but in fact are contrary to, the conclusion reached by the court below.

VI.

This Court should review the decision below because, until corrected, it will permit and invite unlawful discrimination by carriers between shippers, and thus defeat one of the fundamental purposes of the Interstate Commerce Act.

The unfortunate practical consequences of the decision of the court below are evident in the light of the strong public policy for uniform treatment of all shippers. It does not do justice to the problem to say, as did the court below, that "the same rule would uniformly apply under similar facts".

The decision sought to be reviewed is that no claim need be filed if it can be shown that the carrier knew of the loss. It is difficult to say, even, whether the rule of the decision below requires that the carrier have a written record of the loss. Indeed, since the essence of the rule as pronounced by the court below is knowledge by the carrier, the significance of the written record would seem to be merely that it constitutes convenient evidence of such knowledge.[1]

[1] And yet "the claim in writing" has substantive importance in the statutory scheme, which refers both to "claims" and to "suits" thereon. Section 20(11) of the Act necessarily contemplates that *claims, i.e.*, demands for payment, will be filed in all cases, for it provides as to the filing of *suits* that the contractual limitation period shall not begin to run until the carrier has *"disallowed the claim"*. Certainly, the carrier's simple notice that a mishap has occurred is not to be regarded as a disallowance of a claim that had not been, and, indeed, might well never be, filed.

In any event, under the rule of the decision below, the question in every case will be not only as to the fact, but also as to the means of evidencing the fact, of knowledge by the carrier of the loss or damage. But the rule of uniform adherence to the claim clause, which the court below rejects, is not arbitrary and without reason.

The reason of the true rule becomes apparent when consideration is given to the potentialities inherent in the rule proposed by the court below. Thereunder, shippers who have failed to file claims in writing within the required time will, nevertheless, be permitted to recover if and when the carrier, willingly or through traffic pressure exerted by claimants, simply admits knowledge of the loss, or the shipper is able to prove such knowledge, but not otherwise. This would leave the result to the discretion of the carrier, or the influence and traffic pressure of the claimant. Inevitably, the result would be unjustified discrimination between shippers.

Even if the means of evidencing the carrier's knowledge were limited to such as were given effect by the court below, i.e., the carrier's file copies of the advices given by it as to the loss, nevertheless the carrier would be given the power to discriminate simply by sending such advices, or not, as it might choose.

We submit that the court below failed to appreciate the importance of the fundamental policy against unlawful discrimination by carriers as between shippers, and the possibilities its decision creates for stultification of that policy.

This Court has ruled repeatedly[1] that the paramount

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[1] *Midstate Horticultural Co., Inc.*, v. *The Pennsylvania Railroad Company*, 320 U. S. 356, 366 (1943); *United States* v. *P. Koenig Coal Co.*, 270 U. S. 512, 519 (1926); *Texas & Pacific Railway Co.* v. *Leatherwood*, 250 U. S. 478, 481 (1919).

policy of the Interstate Commerce Act is the prevention of discrimination and favoritism as among shippers.

The Act's fundamental policy and purpose were expressed by this Court in *New York, N. H. & H. Railroad Co.* v *Interstate Commerce Commission,* 200 U. S. 361 (1906), the Court saying, at p. 391 —

> "It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve."

Again, in *Louisville & Nashville Railway Co.* v. *United States,* 282 U. S. 740 (1931), this Court said (p. 749):

> "The legislative history of the Interstate Commerce Act shows clearly that the evil of discrimination was the principal thing aimed at."

And in *Phillips Company* v. *Grand Trunk Western Railway Co.,* 236 U. S. 662 (1915), this Court said (p. 667):

> ". . . to permit a railroad company to plead the statute of limitations as against some and to waive it as against others would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate . . . also to the giving of preferences by means of . . . waiver of defenses open to the carrier."

In view of the foregoing, we submit that this Court should review the decision of the court below because it would open the door to discrimination, something which Congress, throughout the history of the Interstate Commerce Act, has consistently sought to prevent.

CONCLUSION

For the reasons set forth, we respectfully submit that this Court should issue its Writ of Certiorari, as prayed in the Petition, to the end that the judgment of the court below may be reviewed and that said judgment may be reversed.

Respectfully submitted,

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APPENDIX A

Title 49 United States Code, Section 20 (11):

(11) *Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim*

Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether

such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however*, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing

as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the Commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further*, That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further*, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided further*,

That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And Provided further*, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided.

APPENDIX B

Title 28 United States Code, Section 1254:

§1254. *Courts of appeals; certiorari; appeal; certified questions*

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

APPENDIX C

Title 28 United States Code, Section 1332:

§1332. *Diversity of citizenship; amount in controversy*

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

(1) Citizens of different States;

(2) Citizens of a State, and foreign states or citizens or subjects thereof;

(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) The word "States", as used in this section, includes the Territories and the District of Columbia.

APPENDIX D

Title 49 United States Code, Section 1(6):

(6) *Classification of property for transportation; regulations and practices*

It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing,

and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this chapter upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 665.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Petitioner,

vs.

HOPPER PAPER COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The statement in petitioner's brief is incomplete, requiring respondent to make a short statement of the facts complete in itself.

The petition seeks to have this Court review the judgment of the Court of Appeals for the Seventh Circuit which affirms a judgment of the District Court for $4,952.02 for the admitted value of a carload of paper destroyed in transit in a collision between two of petitioner's trains. On August 10, 1945 plaintiff loaded the paper at Taylorville, Illinois and named its Washington, D. C. agent, Stanford

Paper Company, as consignor and the Government Printing Office at Washington, D. C. as consignee. The paper, while in transit and in petitioner's possession as connecting carrier, was destroyed in a collision between two of its trains due to petitioner's carelessness (R. 39).

Two days after the wreck petitioner wired the consignor as follows:

> "PRR 64688 18 skids paper for U. S. Washington D C destroyed in accident.
>
> (signed) C. F. Parks. Balto & Ohio"
> (Ex. 4, R. 57)

and on the same day sent a similar telegram to the consignee (Ex. 3, Rec. 56).

The case was submitted to the District Court for decision on the record. The Court found (Rec. 74-75): that respondent was the owner of the paper so destroyed and the cause of action for such destruction; that the carload of paper was destroyed because of the negligence of petitioner's agents; that the salvage of such paper was sold by petitioner without respondent's knowledge and that respondent neither received such proceeds nor was any tender of the same made to it; that the telegrams mentioned were sent and received; and that petitioner knew it had destroyed the carload of paper and had at least as much if not more knowledge than respondent had in regard to the damage.

The purpose of the fine printed provision of the bill of lading (see R. 7 where the printing is somewhat magnified) quoted by petitioner and the conclusions of the District Court in deciding this case are succinctly set forth in his memorandum opinion as follows (R. 73):

> "A study of the briefs has not convinced me that, under the facts of our case, a formal notice was prerequisite to suit against the R. R. Co. It seems to me that to require this where defendant was already in

possession of at least as much, if not more, information relative to the damages in question as the plaintiff, would be favoring technicalities rather than the realities of the situation. The decided trend of the law is to the contrary.

"To hold that plaintiff must comply strictly with the terms of the bill of lading where defendant was already in possession of all pertinent facts and had itself first given notice to plaintiff of the disaster, would certainly be to require a useless act. This the law does not favor.

"Counsel for plaintiff may submit proposed findings of fact, conclusions of law and a judgment order in favor of plaintiff for the admitted damages.

CHAS. G. BRIGGLE,
United States District Judge."

This decision was affirmed by the Court of Appeals for the Seventh Circuit with Circuit Judge Kerner writing the unanimous opinion of the Court (R. 94-98, 178 Fed. (2d) 179).

Petitioner's Specification of Errors.

The petitioner's specification of errors at pages 13-14 of its brief may be fairly summarized as contending that the Court of Appeals erred in:

1. Holding that actual knowledge by the petitioner of the loss caused by the wreck of its trains and the destruction of the entire carload of paper dispensed with the need for filing a claim in writing as mentioned in the bill of lading.

2. Holding that copies of the petitioner's telegrams on file with it (Ex. 4 and 5, R. 56-57) reporting the destruction of the carload of paper in the wreck substantially complied with the bill of lading provision that the carrier have written notice within nine months that the owner of the destroyed cargo had a claim for reimbursement.

It is the respondent's position that neither of these holdings is erroneous and that neither the decision of the District Court nor the unanimous decision of the Court of Appeals is in error. However, it should be noted that while both of the above holdings are in favor of the respondent, each is independent of the other and sufficient in itself to sustain the judgment sought to be reviewed.

It is also respondent's position that these holdings are limited by the particular facts present in this case, which are not in common in any of the cases relied upon by petitioner. Requiring a carrier to pay for a carload of destroyed paper, when it has full knowledge of the loss caused by its admitted negligence and a written record thereof in its files, will neither "bring doubt and uncertainty into a substantial segment of the law of interstate commerce" (Pet. 14, 16) nor will it "invite unlawful discrimination • • • and thus defeat one of the fundamental purposes of the Interstate Commerce Act" (Pet. 15, 28).

Summary of Argument.

This Court should deny petitioner's application for a writ of certiorari for the following reasons:

1.

ACTUAL KNOWLEDGE BY THE CARRIER OF ALL INFORMATION WHICH A WRITTEN CLAIM WOULD DISCLOSE, MAKES INAPPLICABLE A PROVISION IN A CONTRACT OF SHIPMENT PROVIDING FOR WRITTEN CLAIM OF LOSS.

(a) Such holding brings no doubt or uncertainty into the law of interstate commerce.

(b) Such holding is not in conflict with decisions of this Court.

(c) The case involves no important question which should be settled by this Court.

(d) Such holding is not in conflict with decisions of other Courts of Appeal on the same question.

(e) State court decisions are not erroneously cited or at variance with any so-called "federal rule".

(f) Requiring petitioner to pay for the property it negligently destroyed is not discrimination by carriers between shippers, but is in accordance with the provisions and purposes of the Interstate Commerce Act.

2.

THE COPIES OF PETITIONER'S TELEGRAMS ON FILE WITH IT REPORTING THE DESTRUCTION OF THE CARLOAD OF PAPER SUBSTANTIALLY COMPLIED WITH THE BILL OF LADING PROVISION THAT THE CARRIER HAVE WRITTEN NOTICE WITHIN NINE MONTHS THAT THE OWNER OF DESTROYED CARGO HAD A CLAIM FOR REIMBURSEMENT.

ARGUMENT.

1.

ACTUAL KNOWLEDGE BY THE CARRIER OF ALL INFORMATION WHICH A WRITTEN CLAIM WOULD DISCLOSE, MAKES INAPPLICABLE A PROVISION OF A CONTRACT OF SHIPMENT PROVIDING FOR WRITTEN CLAIM OF LOSS.

a.

Such Holding Brings No Doubt or Uncertainty Into the Law of Interstate Commerce.

The only doubt or uncertainty interjected into the law of interstate commerce is that injected by the petitioner rather than by the decision of the Court of Appeals. At pages 16, 17 and 18 of its brief petitioner repeatedly states that the claim requirement of the bill of lading cannot be "waived", but the entire record and the opinions of both the District Court and Court of Appeals are devoid of any reference to the subject of waiver. In fact, respondent has never contended that petitioner waived any provision of the fine print of its bill of lading. Its contention simply is that (1) when petitioner knew more about the destruction of respondent's property than respondent, itself, there was no necessity to give petitioner notice, and (2) copies of petitioner's telegrams on file with it reporting the destruction of the carload of paper substantially complied with the notice provision of the bill of lading.

To support this mock issue of alleged **waiver** petitioner cites the case of *Midstate Horticultural Co., Inc.* v. *The Pennsylvania Railroad Co.* (1943), 320 U. S. 356. There this Court merely held that the three-year statute of limita-

tions for the recovery of freight charges under an entirely different section of the Interstate Commerce Act could not be expressly waived by a shipper to permit a carrier to recover on a stale freight claim. *Empire Box Corp.* v. *Delaware, Lackawanna & Western Railroad Co.* (1948 C. A. 2d), 171 Fed. (2d) 389, and *Davis* v. *Henderson* (1924), 266 U. S. 92, are to the same effect except that there freight tariff rules were involved. In the cases here under consideration neither any question of waiver, statute of limitations, nor tariff schedule is involved.

The case of *Georgia, Florida & Alabama Railway Co.* v. *Blish Milling Co.* (1916), 241 U. S. 190, cited and quoted from at pages 18 and 19 of petitioner's brief on this same irrelevant waiver proposition is the same case cited by the Court of Appeals (R. 96) below. The principal difference is that the Court below cites and quotes from the case for the germane proposition that the purpose of the notice provision of a bill of lading is "not to escape liability but to facilitate prompt investigation". This Court allowed recovery in the *Blish* case just as did the Court below in the case under consideration. It is submitted that injecting the extraneous issue of waiver in this case does not change the issues or holding of the Court of Appeals and thereby "create doubt and uncertainty in the law".

b.

Such Holding Is Not in Conflict With Decisions of This Court.

At page 20 of its brief petitioner cites six decisions of this Court which it claims are in conflict with the decision below. Four of these six cases are cited in the footnote to the opinion of the Court of Appeals (R. 96) and were distinguished with the following language: " We do not think

it necessary to discuss the cases cited by defendant, for the reason that they are distinguishable on the facts. None of them have passed upon the identical problem with which we are confronted here and hence they are not controlling." This distinction also holds true for the other two cases, but since petitioner endeavors to make such an issue of the matter, we shall, at the risk of lengthening this brief, point out in the order cited by petitioner why each case is not applicable.

Chesapeake & Ohio R. Co. v. *Martin* (1931), 283 U. S. 209, is an estoppel case. It was contended that the failure of the carrier to follow instructions for the delivery of potatoes estopped it from requiring written claim. The Court merely held that these facts were insufficient to raise an estoppel against the carrier. However, it was carefully pointed out that this result was based upon the facts of that case and it is inferred that a shipper might even invoke the doctrine of estoppel. The Court say at page 222:

> "Whether under any circumstances the shipper may rely upon that doctrine in avoidance of the time limitation clause of the bill of lading, we need not now determine."

It is also significant that no brief was filed in behalf of the shipper in that case. With no question of estoppel presented in the case now before this Court the *Martin* case is clearly distinguishable.

Davis v. *Roper Lumber Co.* (1925), 269 U. S. 158, involved a misdelivered car of scrap iron with the question considered by the Court being whether the misdelivery was negligent. No question is considered by the Court as to any knowledge on the part of the carrier as exists in the instant case.

Gooch v. *Oregon Short Line Railroad Co.* (1922), 258

U. S. 22, is a personal injury case in which recovery was denied to the plaintiff, traveling under a drover's pass, because only oral and not written notice of his injury was given. One Justice was absent and three dissented. Apart from the utterly dissimilar factual situation the case is distinguishable because the carrier had no knowledge as to the extent of the injuries, while in the case under consideration the carrier had more knowledge of the destruction of the carload of paper than did respondent.

The Baltimore and Ohio Railroad Co. v. *Leach* (1919), 249 U. S. 217, is a case involving damage to livestock shipped under a bill of lading requiring written claim for damages within five days. Only oral claim was made and this Court in a brief two paragraph opinion with two dissents held that the written claim provision had not been waived. Here, neither oral notice nor waiver is involved.

Southern Pacific Co. v. *Stewart* (1919), 248 U. S. 446, is simply a case of waiver and nothing more. In setting forth the shipper's pleadings the Court say at page 449:

> "* * * that the carrier had repeatedly waived requirement for demand within ten days by recognizing the shipper's right to recover something and attempting to settle and compromise; and that subsequent to October 21st carrier, through its claim agents, had twice attempted to adjust with the shipper the loss and damage sustained."

This Court merely held, with two Justices dissenting, that such negotiations were insufficient to waive the requirement for written claim, saying at page 450:

> "And we also think those opinions make it clear that the circumstances relied upon by the shipper are inadequate to show a waiver by the carrier of written notice as required by the contract."

In the case under consideration there were no negotiations

with respondent and it has never been contended by respondent that there was any waiver.

St. Louis, I. M. & S. R. Co. v. *Starbird* (1917), 243 U. S. 592, involved only an oral notice given to a dockmaster of the condition of five carloads of peaches. This Court merely held that oral notice was insufficient. No oral notice whatever is involved in the case at bar.

Finally petitioner again tries to distinguish the case of *Georgia, Florida & Alabama Railway Co.* v. *Blish Milling Co.* (1916), 241 U. S. 190, quoted from by the Court of Appeals. While a brief telegram in the *Blish* case was held to constitute reasonable notice so as to hold the carrier liable, there were two telegrams sent in the case now before the Court (Exs. 3 and 4, R. 56-57):

> "PRR 64688 18 skids paper from Stanford Paper Co. destroyed in accident." and
>
> "PRR 64688 18 skids paper for U. S. Washington D C destroyed in accident."

Both reveal full knowledge by the petitioner of the loss. If respondent had sent such a telegram to the petitioner instead of vice versa, it would, under the authority of the *Blish* case, be held to be sufficient notice. When the petitioner already had such notice then such notice to it would have been useless.

Another way of stating the same proposition is to use the language of this Court in the *Blish* case in referring to the purpose of the notice provision (p. 198):

> "It is addressed to a practical exigency and is to be construed in a practical way."

Surely it can serve no useful purpose to require a shipper to file a claim giving notice to a carrier of facts which it learned from the carrier itself by its telegram. If the carrier had reasonable notice as this Court points out,

this is the only object of the provision and the carrier thereby may not escape liability for the damage which its admitted carelessness caused merely because the shipper failed to notify the carrier of facts it already knew. Petitioner's knowledge of the loss far outstripped that of respondent because the paper was entirely in its care, the wreck of its own trains caused the damage and the damaged paper, the only real evidence, was inspected and sold by petitioner instead of being delivered in accordance with the contract of shipment.

It is submitted that the decision of the Court of Appeals is not in conflict with decisions of this Court but rather is in accord with them.

c.

The Case Involves No Important Question That Should be Settled By This Court.

It is interesting to note that after strenuously contending under point II (pp. 19-23) of its brief that the decision below is in conflict with settled decisions of this Court, petitioner under point III (pp. 23-24) takes the utterly inconsistent position that the question decided below has not been settled by this Court and that it should now be settled. This time petitioner rehashes the same decisions of this Court previously dealt with, but sets up a new mock issue of **estoppel**, although there is not one word in the opinion of the lower Courts or in the record of this case even hinting at estoppel. Interjecting a mock issue does not create an important question for the decision of this Court but does demonstrate petitioner's ingenuity in throwing up a multitude of contentions which are both inconsistent and without foundation in the record in the hope that certiorari may be granted.

d.

Such Holding Is Not in Conflict With Decisions of Other Courts of Appeal on the Same Question.

In endeavoring to show that the Seventh Circuit is in conflict with other Circuits, petitioner again cites half a dozen cases. In order to show that there is no such conflict we shall briefly analyze each case.

Gillette Safety Razor Co. v. *Davis* (1922, C. C. A. 1st), 278 Fed. 864, was an action to recover the value of a shipment stolen from a carrier. The case was decided on the question as to whether the theft was due to the carrier's negligence or whether it was without fault. It is submitted that this case in no way creates any conflict between the First and Seventh Circuits.

Manby v. *Union Pac. R. Co.* (1926, C. C. A. 8th), 10 Fed. (2d) 327, involved four carloads of sheep accompanied by the owner and consigned to him. En route, with what the carrier considered the shipper's consent, the sheep were delivered to a commission company that in turn resold the sheep. After the commission company failed to pay for the sheep, and a judgment against it was found unavailing, the shipper attempted to hold the carrier liable. The shipper's suit was an afterthought to try to recover his loss from a responsible defendant and oral notice to the carrier was held insufficient. No oral notice is involved in the case before the Court.

Olson v. *Chicago, Burlington & Quincy Railroad Co.* (1918, C. C. A. 8th), 250 Fed. 372, *Clegg* v. *St. Louis & San Francisco Railroad Co.* (1913, C. C. A., 8th), 203 Fed. 971, and *Kidwell* v. *Oregon Short Line Railroad Co.* (1913, C. C. A. 9th), 208 Fed. 1, all involved livestock shipments where loss occurred due to injury to the stock or delay in its receipt. In each case in consideration of a reduced rate

the livestock was shipped under a bill of lading requiring written notice of loss within a short period (usually ten days). In each case oral rather than written notice of loss was given the carrier and in none of the cases was there evidence that it had any other knowledge of the loss. Recovery was denied the shipper in each case. With no oral notice whatever in the case under consideration but with the carrier having full knowledge of the loss it is submitted that the Eighth and Ninth Circuits are not in conflict with the Seventh.

Only a question of waiver was considered by the Court of Appeals for the District of Columbia in deciding the sixth case cited by petitioner, *American Railway Express Co.* v. *The Fashion Shop* (1926, Ct. of App. D. of C.), 10 Fed. (2d) 909. No question of waiver is here involved.

In dealing with the case of *Lehigh Valley R. Co.* v. *State of Russia* (1927, C. C. A. 2d), 21 Fed. (2d) 396, cited by the Court below, petitioner inserts its own language in brackets in the quotation from this case at page 25 of its brief as follows:

"[by the filing of the claim as instructed]"

Such liberties with the language of the Court obviously changes its meaning to suit petitioner's needs.

The point petitioner studiously seeks to avoid by this interlineation is the fact that the requirement in the bill of lading in the *Lehigh Valley* Case was **never** complied with and yet the Court of Appeals permitted recovery because of the carrier's knowledge of the loss as here. In that case, as here, the carrier had full knowledge of the loss and **notified** consignor and consignee thereof. The carrier's knowledge was acquired independently of advice by the owner of the property, which recovered judgment for the loss although it filed no claim that complied with the

bill of lading. It was the carrier's knowledge that brought about recovery and not the language which the petitioner at this late date seeks to engraft upon the opinion. It is submitted that the Court of Appeals clearly understood the opinion in the *Lehigh Valley* case as it was originally written and that such case is definitely in point, particularly since this Court denied certiorari therein (275 U. S. 571).

It s submitted that the Court of Appeals for the Seventh Circuit is not in conflict with the First, Eighth and Ninth Circuits and the District of Columbia and is in accord with the Second Circuit.

e.

State Court Decisions Are Not Erroneously Cited or at Variance With Any So-Called "Federal Rule".

Petitioner's assertion that there are divergent local and federal rules governing the construction of the loss provision of a bill of lading entirely ignores the obvious point that federal and state courts have concurrent jurisdiction to enforce shippers' causes of action against carriers arising under interstate shipments. See *Missouri ex rel. St. Louis, B. & M. R. Co.* v. *Taylor* (1924), 266 U. S. 200 at 208. Both federal and state courts are concerned only with the interpretation of the fine print of a contract of shipment between shipper and carrier, prepared by the carrier and therefore to be most strongly construed against it (*Texas & Pacific Railway Company* v. *Reiss* (1902), 183 U. S. 621, 626). Neither federal nor state courts have any rules of interpretation that are in conflict with each other but all are seeking the common attainment of doing justice between the parties. Many more state decisions have naturally been rendered in the enforcement of shippers' rights and that is why the Court of Appeals cited a number of state cases from the Courts of North Carolina, Tennessee,

Kansas, South Carolina and Missouri as persuasive authority.

While no fault is found with the other state decisions cited by the Court of Appeals, petitioner at page 27 of its brief contends the North Carolina case of *Kime* v. *Southern Ry. Co.* (1910), 153 N. C. 398, 69 S. E. 264, is overruled by the case of *Taft & Vandyke* v. *Atlantic Coast Line R. Co.* (1917), 174 N. C. 211, 93 S. E. 752. This latter case involved an action for $62.89 for damage to furniture shipped under a bill of lading requiring written notice of loss. In the light of the small amount of the damage claimed the carrier had no knowledge of the loss. However, it cannot be urged that petitioner, in the case under consideration, had no knowledge when an entire carload of paper worth more than four thousand dollars was destroyed and the petitioner itself sold the salvage, kept the proceeds, and telegraphed consignor and consignee that the carload of paper had been destroyed in an accident.

Petitioner at page 27 of its brief cites and quotes from the case of *Metz Co.* v. *Boston & Maine Railroad Co.* (1917), 227 Mass. 307, 116 N. E. 475. Here the Massachusetts Court poses the question for decision at page 308 (476) as follows:

> "Therefore, the single question presented is whether such a condition in a bill of lading can be waived under the federal laws relating to interstate commerce."

This case is not in point because it is concerned with a question of waiver when there is no evidence of waiver in the case before this Court.

Other recent federal and state cases that are not cited by the Court of Appeals in their opinion but which also support that opinion are:

> *Minot Beverage Co.* v. *Minneapolis & St. Louis Ry. Co.* (1946, D. C. Minn.), 65 Fed. Supp. 293, 294-296.

The Henry S. Grove (1923, W. D. Wash., N. D.), 292 Fed. 502, 504.

Indiana Harbor Belt R. Co. v. *Alpirn* (1941), 139 Neb. 14, 18-19, 296 N. W. 158, 161.

It is submitted that the decisions of this Court, of the State Courts, and of the Court of Appeals below are all consistent with each other based upon the facts in each case.

f.

Requiring Petitioner to Pay for the Property It Negligently Destroyed Is Not Discrimination By Carriers Between Shippers But Is in Accordance With the Provisions and Purpose of the Interstate Commerce Act.

While the Court of Appeals in the last two paragraphs of its opinion (R. 97-98) very effectively disposed of petitioner's discrimination argument, the same argument is again advanced as the last reason why certiorari should be granted. This is not surprising for whenever the imposition of liability for the damage or destruction of a shipper's property seems certain and all other defenses have failed the carrier, it parades forth the spectre of discrimination to try to shield itself from the wrongs it has inflicted. Such is the case under consideration when petitioner contends the holding below "will permit and invite unlawful discrimination by carriers between shippers".

Clearly, the allowance of a recovery in this case for the admitted value of the cargo where the carrier had full knowledge of the loss caused by its admitted negligence and also had a written record thereof on file with it, cannot be fairly construed as discrimination in favor of the shipper or against the carrier. Obviously, the same rule would uniformly apply under similar facts to all other shippers and carriers.

The cases of *Baldwin* v. *Atlantic Coast Line R. Co.* (1915), 170 N. C. 12, 86 S. E. 776; *Schloss-Bear-Davis Co.* v. *Louisville & N. R. Co.* (1916), 171 N. C. 350, 88 S. E. 476 and *The Argentino* (1939, D. C., S. D. N. Y.), 28 Fed. Supp. 440, cited by the Court of Appeals in the last paragraph of their opinion (R. 98), clearly demonstrate the fallacy of petitioner's argument. It is significant that these cases are completely ignored by petitioner without any attempt to meet or obviate them.

2.

THE COPIES OF PETITIONER'S TELEGRAMS ON FILE WITH IT REPORTING THE DESTRUCTION OF THE CARLOAD OF PAPER SUBSTANTIALLY COMPLIED WITH THE BILL OF LADING PROVISION THAT THE CARRIER HAVE WRITTEN NOTICE WITHIN NINE MONTHS THAT THE OWNER OF DESTROYED CARGO HAD A CLAIM FOR REIMBURSEMENT.

All of petitioner's arguments as to why this Court should grant the writ of certiorari to review the decision of the Court of Appeals are grounded upon the assumption that no written claim was filed by respondent with petitioner within nine months. If a written claim was filed with the petitioner within such nine months the judgment of the Court below is also sustainable without error on this completely independent ground without any need to consider any of petitioner's arguments.

The Court of Appeals also recognized this completely independent ground for holding petitioner liable for the damage it carelessly inflicted when in the last paragraph of their opinion (R. 98), in referring to respondent's claim, it is stated that the petitioner had "a written record thereof in its files". The petitioner placed in its files copies of the telegrams (produced by the petitioner, R. 48-49) sent by it on August 18, 1945, two days after the wreck, to respondent's consignor agent and the consignee stating that the carload of paper was destroyed in the accident.

This was in effect the filing with petitioner of a written claim for the loss of the cargo. It substantially complied with the bill of lading. It was in writing and it disclosed facts showing that the shipper had a claim against the carrier. The petitioner knew the loss had been caused by its negligence and therefore had "reason to expect claim for compensation to be made against it" (*Barrett* v. *VanPelt* (1925), 268 U. S. 85, 90). There is nothing in the bill of

lading requiring the claim to be presented by the owner or to specify the amount of the loss. It is sufficient that it be in writing and disclose that there is a claim against the carrier because of the occurrence. This is sufficient to put the carrier on notice, which is the only reason for the requirement. In *Georgia, Florida & Alabama R. Co.* v. *Blish Milling Co.* (1916), 241 U. S. 190, this Court held a one sentence telegram complied with the written notice provision of the bill of lading and said in regard to the provision at page 198: "—the object of which was to secure reasonable notice." Clearly in the case before this Court the petitioner had in the copies of the telegrams sufficient evidence in writing to put it on notice that there was in fact a claim against it for the destroyed carload of paper. This is all that was necessary under the provisions of the bill of lading.

Thus petitioner's written record of the loss fully supports the judgment below and renders immaterial each of petitioner's points and arguments.

Conclusion.

Despite the fact that it has lengthened this brief we have taken the space to demonstrate the inapplicability of the cases cited or quoted from by petitioner. We have done so in some detail in order to show that these authorities wander off into the by-lanes of discrimination, waiver, oral notice and estoppel and do not consider the issue before the Court: Shall a carrier pay for property consigned to its care which it negligently destroyed and of which destruction it has a written record on file?

We submit that this case presents the simple problem of a carrier that has knowingly destroyed a carload of the respondent's property of admitted value and by its admitted carelessness. The carrier has no justification whatever for its conduct and has made no effort to pay for the damage it has inflicted. Instead it pleads a technical defense asking that respondent inform it in writing of respondent's loss when it well knew and had on file a record of such loss. Neither law nor equity supports such a defense. The decision below is fair and just. If left undisturbed there is nothing about it which will be detrimental to the general state of the law nor to the proper disposition of cases that may hereafter arise.

It is submitted that the judgment of the Court of Appeals for the Seventh Circuit is correct and that the Court should deny its writ of certiorari to review the same.

Respectfully submitted,

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